CASE SUMMARY

Complaint against the Lands Department, Home Affairs Department, Environmental Protection Department, Planning Department and Transport Department for unreasonably approving the re-grant of a site for use as public car park

The Complaint

The complainant complained against the Lands Department (Lands D), Environmental Protection Department (EPD), Home Affairs Department (HAD), Planning Department (Plan D), and Transport Department (TD) for unreasonably approving the re-grant of a site for use as a fee-paying public car park without public consultation and a proper assessment of the environmental nuisance involved.

Background Information Provided by the Complainant

2. The complainant attributed the increased traffic noise and air pollution to container trucks and heavy vehicles using the car park near his residence. He alleged that no proper assessment of the environmental nuisance involved was conducted and no public consultation was carried out before the site was regranted for use as a car park. He further claimed that using the site for car-parking was a wrong planning decision. Feeling aggrieved, he lodged a complaint with The Ombudsman.

Observations and Opinions

Complaint against Lands D

3. The proposal to re-grant the site was approved by the district's Lands Conference, an inter-departmental meeting convened by the District Lands Office (DLO). The decision was taken against the background of heavy demand for and shortage of parking facilities for heavy goods vehicle in the district, and the assessment that exclusion of heavy vehicles from the car park would aggravate unauthorized vehicle parking on public roads in the district. This Office noted that DLO had complied with the necessary procedures in gathering relevant information for the meeting, and had consulted relevant government departments, including TD, EPD, Plan D and HAD. This Office noted that the responsibility of Lands D was to administer government land and that it did not have a direct role in public consultation or environmental assessment. The merits of the decision aside, The Ombudsman considered that this complaint against Lands D was **unsubstantiated**.

Complaint against EPD

4. According to EPD, the department had concluded in 1993 that the use of the subject site for parking of container or heavy vehicles was not appropriate and should not continue after the occupation of the housing estates opposite to the site.

5. Before submitting the re-grant proposal to Lands Conference, DLO had (a) issued a memo to EPD specifically seeking its comments on the continued use of the site as a car park in view of complaints about noise received in the past, and (b) circulated conference papers to TD, HAD, Plan D, EPD and other concerned departments informing them of past public complaints about noises generated by the car park, and recommended exclusion of container tractors and heavy goods vehicles from using the car park.

6. However, EPD failed to offer any comments and simply referred DLO to a memo it issued in 1997. The memo stated, inter alia, that EPD would not comment on individual land title case except in very special circumstances, as there were other existing mechanisms to check and regulate developments that have a potential for major environment impacts.

7. This Office had serious reservations about EPD's stance in taking no action in response to DLO's request for environmental input. We noted that there had been local complaints about the site's usage in the past. This had prompted DLO to write to EPD to ask specifically comments on the proposed re-grant of the site for use as a car park. The conference papers relating to the case also stressed the need for EPD's comments. In effect, EPD declined to offer any comment. In so doing, this Office noted that EPD had made no attempt to find out whether and if so, what stance had the department taken previously on the case, and was unaware that its Local Control Office was in fact investigating a similar noise complaint.

8. As the department having primary responsibility for environmental protection matters, it was legitimate for other government departments to look to EPD for advice on environmental management for land-use and related planning purposes. While this Office accepted that resource constraints necessarily meant that government departments had to prioritize their work and that EPD's primary concern was for large scale projects that had a potential for major environmental impacts. Nevertheless, this could not be translated into a complete withdrawal from involvement with all other, smaller projects or development proposals. In its memo of 1997, EPD acknowledged that there would be "special circumstances" that warranted its input into individual cases. Although not defined, this Office considered that a specific request for input in the light of known past public complaints would probably qualify one of those "special circumstances" contemplated by the 1997 memo. In the circumstances, this Office found EPD's almost automatic response of non-engagement had fallen short of its responsibility for environmental management. This effectively meant that the usage of the site had to be determined without sufficient environmental nuisance assessment. The Ombudsman considered that this complaint against EPD was **substantiated**.

Complaint against HAD

9. HAD did not advise DLO on whether public consultation was necessary in regard to the proposed use of the site for heavy vehicles car park. Given that HAD's role was to help ensure that local facilities and development would proceed with the cognizance of local community aspirations and sentiments, the District Office (DO)'s inaction in this matter was a failure to discharge its responsibility. The present case also revealed clearly the Office's inadequacy in monitoring the concerns and aspirations of at least one sector of its local community. Having considered all the relevant factors, The Ombudsman concluded that the complaint against the HAD was **substantiated**.

Complaint against TD

10. TD maintained that the subject site catered for a pressing need for good vehicles parking facilities in the district, as revealed in the Parking Demand Study. Unless this demand was met, there would be no alleviation of the unauthorized parking on local roads around residential areas. This would cause road safety problems to residents.

11. This Office considered that TD's objective and actions in the present case stemmed from its primary concern about the adequacy of parking spaces for the heavy vehicles and road safety and that these were in accordance with its departmental purview and objectives. The Ombudsman concluded that the complaint against TD was **unsubstantiated**.

Complaint against Plan D

12. Plan D raised no statutory planning objection to the proposed car park at the inter-departmental meeting. With a life expectancy of '5 years or less', the proposed tenancy was considered as a temporary use and, according to the Notes of the Outline Zoning Plan (OZP), was permitted as long as it complied with Government's requirement. The Notes formed part of the OZP and were exhibited for public inspection before approval together with the OZP and as such were admissible on this basis. The Ombudsman considered that this complaint against Plan D was **unsubstantiated**.

Recommendations

13. Given the shortage of parking spaces for goods vehicles in the New Territories, it was expected that short-term tenancies would continue to be granted for use as temporary car parks. This would unavoidably pose environmental concerns for residential developments close by. It was therefore incumbent upon the Government to balance the conflicting demands and interests of the parties involved and to try to minimize adverse effects for those affected. In this regard, we recommended that HAD should consider issuing guideline for its staff when considering possible need for assessing

local views and sentiments in relation to district projects and developments in future. We also recommended that EPD should consider reviewing the environmental management arrangements for temporary land usage so that government departments could be provided with advice to pre-empt or mitigate any likely environmental nuisance arising from proposed temporary land usage.

14. The Ombudsman considered that it was imperative and important for future short-term tenancies grants for car-parking facilities to incorporate abatement measures against noise and other pollution. She recommended that EPD should take a more active approach in providing professional advice and proposals to TD and DLO to help alleviate disturbance and nuisance similar to the present case.

Comments received from departments

15. Complainee departments had been invited to comment on the investigation report. In response:

(a) Plan D had no specific comments.
(b) Lands D informed that DLO and TD were liaising with the car park operator on the layout of the vehicle parking to mitigate any potential nuisance caused by the operations within the parking area.
(c) HAD agreed that the department should be more pro-active in the consultation of the public. Staff of the department had been instructed to be more sensitive to possible local reaction to government proposals and that the DO was reviewing the current practice of consultation and would certainly take into account the lessons of this case.
(d) TD worried that the requirement to provide noise mitigation measures might affect the commercial viability of temporary car parks, but agreed that low cost environmental mitigation measures could be incorporated into temporary car park tenancies. The department was of a view that traffic associated with the subject car park would unlikely have significant contribution to the noise problem in the surrounding area.
(e) EPD did not accept the conclusion of the investigation. It considered that the subject tenancy was not a special case that called for additional advice over and above those general guideline provided for departments. It considered that the statement from the 2000/01 Estimates – "the department (EPD) seeks to prevent environmental problems through reviewing and advising the relevant authorities on land-use, planning proposals and development strategies at the policy, territorial, sub-regional and district level." – as having been quoted out of context as it clearly referred to major development proposals and policies rather than individual land use cases; that the streamlining spirit

adopted was the right development; that the noise analysis and observation made in our investigation was a technical fraud; and that EPD could not be held responsible for decisions beyond its authority.

Ombudsman's response to the departments' comments

16. The Ombudsman was pleased to note that DLO would work with TD to mitigate any potential nuisance caused by the car-parking operations. She was also pleased to note that HAD supported the recommendation to review the current practice of consultation.

17. Having noted EPD's response, The Ombudsman has decided to stand by her earlier comments. She did not accept EPD's stance that 'the subject case is not a special case and that they had received no further inquiries on the case'. The fact was EPD staff had not assessed the case before replying to DLO's request for the department's input. In view of known local complaints, DLO had specifically sought EPD's comments. This need was again reiterated in the Lands Conference papers distributed to EPD.

18. The Ombudsman has not suggested that EPD should move away from the 'streamlinging' approach and to focus on 'minor temporary uses', but has pointed out the need not to abdicate automatically responsibility in respect of the latter. The decision to re-grant the tenancy was reached by relevant Government departments collectively. There was no question of EPD having been held "responsible for others' decisions". The Ombudsman has not attributed to EPD the decision to re-grant the site. EPD is being criticized for its automatic refusal to respond to another department's request for environmental input; its failure to take action to assess whether this case justified its involvement; and to find out whether and if so what previous stance the department had taken in respect of the site. The Ombudsman believes that EPD should re-consider its role in respect of smaller projects and other temporary land uses, so as to ensure that to minimize adverse environmental impact posed to neighbouring residential developments.

Final Remarks

19. Taking the above into consideration, The Ombudsman considered that the conclusion and recommendations of this investigation should remain unchanged. The public has legitimate aspirations for a reasonably clean, healthy and comfortable living environment. Where land usage might give rise to environmental nuisance that adversely affects the well being of nearby residents, reasonable abatement measures should be taken to protect the latter's interest. This investigation had identified that this might not have been done in some cases where land usage is temporary in nature (i.e. where the site has a life expectancy of '5 years or less') or where the project is not substantial enough for EPD to consider as having "a potential for major environment impacts".

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